STATEMENT ON OFCOM'S ILLEGAL HARMS CODES OF PRACTICE

1. Last February, the OSA Network published a statement in response to Ofcom's consultation on its illegal harms proposal. It was signed by 23 organisations and experts representing the breadth of interests across our membership and was the culmination of many months of discussion with Ofcom on the issues. The headlines we raised in the statement were explored in more detail in the OSA Network's full response and reflected in the public letter, and supporting evidence, from groups campaigning against Violence Against Women and Girls.

2. Many of the same concerns were repeated in our and others' responses to Ofcom's children's codes consultation because both sets of codes were built on the same foundation: a cautious interpretation of the legislation that, we believe, will fundamentally affect the effective implementation of the regime which has - at its heart - the protection of users from harm. In the subsequent 7-10 months since both consultations closed, we - along with many other civil society organisations representing a broad swathe of victims' interests - made many representations to Ofcom and spent many more hours in meetings with them to expand on the issues. These meetings were also used to set out the evidence (from both academic research and lived experience) of the reality of the harm to victims that was likely to either arise as a result of the gaps in Ofcom's proposals or to be only partially mitigated by the weak nature of them.

3. The scale of the civil society evidence presented to Ofcom - and the related investment of time and resource in providing it - can be judged by a quick flick through Ofcom's Illegal Harms Statement's "Approach" document where footnotes referencing the submissions often take up more than half the pages of text. Much more was submitted to the regulator - at Ofcom's request - outside the consultation process. Very little feedback on whether that evidence had helped was received in return: civil society stakeholders had to wait for the publication of the codes to find out if their representations had been taken on board.

4. The answer to that when it came just before Christmas was a resounding no - with a few, very limited exceptions. Suggestions from civil society on how to strengthen the codes to protect users better have had no impact. Responses from industry have, conversely, led

to many changes - to weaken them.[1] None of these changes in industry's favour were run past civil society or victims groups, and no further consultation on them is proposed. We set out one particularly worrying example of this in the annex to this document - where feedback from "a small number" of industry stakeholders led to a material change to a key measure in the codes (the requirement to swiftly take down illegal content, which now only has to be done if "technically feasible"). Victims groups only became aware of this important and significant change when the illegal harms statement was published.

5. In short, the investment of time and resources by civil society groups, and the supply of evidence to Ofcom to support their concerns, over the past 12 months has made little impact - except to take up space in the footnotes. Instead, we are now required to complete further responses and submit yet more evidence to a further illegal harms consultation in April on (some, but by no means all of) the issues we raised in the first round.[2] Any subsequent changes to the next iteration of these codes won't come into force for a further 18 months' time. The time this is taking is unacceptable, leaves victims and vulnerable users open to significant harm, and undermines the repeated assurances from Ofcom that it understands the material impact of the concerns that have been expressed to them.

6. We set out in the annex to this statement Ofcom's responses to the main points we made in our original statement on the illegal harms consultation. Our recommendations to Ofcom fell into two broad categories:
    a. Those that stem from our assessment that Ofcom could have interpreted the Act in a less cautious way in order to ensure that the obligations placed on regulated services - and, consequently the protections afforded to users - were as stretching and effective as possible.
    b. Those that highlighted where Ofcom's choices about what regulated services were required to do in order to comply with their duties - eg in Ofcom's risk assessment guidance, or in the content of the draft codes - were limited, narrow and weak, even within Ofcom's preferred interpretation of the legislation.

7. We are still of the view that Ofcom's interpretation of the Act has been unnecessarily restrictive and we continue to urge them to reconsider whose interests this primarily serves. But we are disappointed that there has been so little engagement, throughout the whole process, with the substance of our concerns: as we highlight in the annex, Ofcom's responses in the statement are brief with no alternative offered to address the substantive issues (eg the risk of harm being left unmitigated at scale, the gaps between

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[1] Our consultation response noted the "preferential weighting that Ofcom gives to evidence already collected from industry, eg "best practice" from companies, and the undefined threshold it sets for other evidence to meet for inclusion in the codes, which seems very high".
[2] See the "This is just the beginning" section in the Ofcom Illegal Harms Statement press release

the risk assessment duties and the measures companies must take to address their risks, the skewed approach to proportionality that prioritises an economic view over user safety, or the loopholes which companies might exploit as technologies develop and change). Ofcom's response therefore frequently falls back onto its interpretation of the Act as justification for inaction.

8. The purpose of the OSA is for regulated services to assess and mitigate the risk of foreseeable harm to users of online services. Organisations in our network fought hard, and engaged in detailed policy development and engagement work, over many years to ensure that the legislation delivered this. As we said in our original statement, interpretations of the Act involve some degree of judgement and choice. Ofcom has chosen an interpretation of the Act that does not use all the flexibility it provides, resulting in a first set of codes that set a weak foundation for user safety as the OSA regime takes effect. **We urge them in the strongest possible terms to reconsider this choice and avoid repeating the same mistake with the forthcoming children's codes**.

January 2025

Signed by:

Alliance to Counter Crime Online

Antisemitism Policy Trust

Barnardos

Center for Countering Digital Hate

CEASE (Centre to End All Sexual Exploitation)

Christian Action Research and Education (CARE)

Clean Up the Internet

End Violence Against Women Coalition

5Rights Foundation

Glitch

Global Action Plan

Institute for Strategic Dialogue (ISD)

Internet Matters

Kick It Out

Marie Collins Foundation

Molly Rose Foundation

Reset

Samaritans

Thomas William Parfett Foundation

Prof Clare McGlynn, Durham University

Prof Lorna Woods, Essex University

William Perrin, OSAN Advisory Council

ANNEX: OSA Network illegal harms consultation proposals and Ofcom's response

Our statement on the illegal harms consultation was published in February 2024 and supported by 23 organisations in our network. The high-level recommendations are summarised below, along with Ofcom's response and any changes to the codes as a result.

Illegal content judgements guidance

What we said: Too focused on individual items of content rather than system; focuses on criminal offence, rather than content associated with an offence; uses criminal thresholds of proof. Also, in our subsequent response re animal cruelty offences we called for Ofcom to extend section 127 of the Comms Act to address some of the issues here.

What Ofcom says: "As set out in our November 2023 consultation, we agree that it is not a criminal threshold, and we do not consider that the proposals on which we consulted involved the application of a criminal threshold. However, we have no powers to depart from the definition set out in the Act, which requires there to be "reasonable grounds" to infer that "all elements" necessary for the commission of the offence concerned are present." (Vol 3 2.20-2.21)

Changes? Two small concessions (below) but nothing substantive to shift the overall approach.

On ICJG:

- First change re intimate image abuse (page 5): "At consultation, we proposed that, when content is shared, reposted or forwarded, the state of mind that matters is that of the user sharing, reposting or forwarding. We have decided to strengthen this position in relation to IIA. Absent any evidence that the user reposting, forwarding or resharing content has taken appropriate steps to ascertain consent, it is reasonable to infer that the user does not have a reasonable belief in consent. It follows that if the content concerned is an intimate image which has been shared without consent, it will be illegal content when it is forwarded, shared or reposted. This strengthening of our guidance will provide extra protection to victims and survivors of IIA."
- Second change re cyberflashing: "It will be reasonable for service providers to infer the required intent or recklessness where a user sends content depicting genitalia, unless: a) there is evidence of consent from the user(s) receiving the photograph or film or b) it is posted on a service where it is a commonly accepted part of the culture to send and receive intimate images without prior agreement"

On extending section 127:

- "This is something we have considered, as set out in Annex 6 to our August 2024 Further Consultation, but we believe the freedom of expression risks of a broader application of the offence are too significant to justify further widening of the scope. We believe that,

for the reasons set out in paragraph 2.60, it is proportionate to use the s. 127(1) offence with reference to human torture and animal cruelty content, but that this cannot be said for other harms areas. (2.66)"

Focus on evidence and best practice from industry

What we said: preferential weighting given by Ofcom to evidence/"best practice" already collected from industry, and the undefined, high threshold it sets for other evidence to meet for inclusion in the codes, sets bar too low in terms of the measures with which regulated services must comply via the codes and to reinforce the status quo which the legislation was intended to improve

What Ofcom says:

- "We do not agree with the suggestion that we have set the evidential bar too high. Overall, we have applied the threshold required by the Act, and the general principles of public law. Evidence is critical to inform our policies in addition to argument and logic. This ensures that our policies are robust, and that we make proportionate proposals and decisions to protect UK users online. As outlined above, any evidence of harm is taken through our impact assessment framework." (Approach to the Codes para 1.109)
- Also: "We note that some respondents would like to see our Codes recommend providers to mitigate all risks from a service provider's risk assessment. As explained in 'Our approach to developing Codes measures' (1.39), we cannot do this. The safety duties in the Act only require providers to take proportionate steps and we can only make recommendations we are satisfied are proportionate, having impact assessed them. We cannot assess the impact of a proposal if we do not know what compliance with it would entail." (Vol 1 5.23)

Changes? No. No new measures added to the codes. Some, such as that flagged by the Marie Collins Foundation relating to the requirement to have a system to swiftly take down illegal content were, however, watered down because "a small number" of industry stakeholders told Ofcom it was not "technically feasible", a decision taken without consultation with victims' groups. It is only evidence from WhatsApp that is referenced in the statement in this regard (Cf the list included below of civil society responses calling for changes that Ofcom ignored).

Proportionality

What we said: Ofcom's approach to proportionality is primarily economic: to avoid imposing costs on companies. While the OSA requires regulated services take a "proportionate" approach to fulfilling their duties, and indeed requires Ofcom to look at resources, Ofcom is also required – among other issues – to look at the severity of harm.

What Ofcom says:

- "We are more concerned that our measures may hinder providers of smaller services. Our decisions could have a detrimental impact on competition if, for example, some smaller services were not set up because of the online safety measures, or some services did not expand as they might otherwise have done. This is relevant because competition is good for users in providing more choice, driving innovation, and putting downward pressure on prices" (1.150)

- "In some cases, service providers may already have similar or identical measures in place to those outlined in the Codes. Such providers will be able to comply with the measures for very little additional cost. Our analysis focuses instead on the costs for providers who do not currently have similar or equivalent measures. This is a more rigorous test of whether the measures are proportionate; our measures can only be proportionate if they are proportionate for a provider that is not currently doing them." (1.192)

[Note: It is worth also considering the lengths Ofcom is prepared to go to in terms of applying its proportionality test given this particular example: "For example, our measures to protect children from grooming may have the indirect cost for adult users of a service by making it harder for them to connect with children online".]

Changes? No.

Safety by design/Lack of focus on outcomes

What we said: Weak "safety by design" foundations mean there is a disconnect between the evidence of harm in the risk profiles and the mitigation measures in the codes of practice: the former identifies the significant role of systemic issues, design and functionalities (many of them being a factor in multiple different risks/offences) but the latter does not adequately address these aspects in terms of mitigation, focusing mainly on post-hoc actions (content moderation, takedown, complaints etc)

Specifically we asked that Ofcom introduce a measure to require platforms to mitigate all the risks identified in their risk assessments. We also challenged why many of the "enhanced" measures weren't applicable to all companies.

What Ofcom says:
- On safety by design, Ofcom's press release says: "People in the UK will be better protected from illegal harms online, as tech firms are now legally required to start taking action to tackle criminal activity on their platforms, and make them safer by design". However, there are no new measures introduced since the draft versions and no mention of "safe by design", "safety by design" or "safer design" in the codes of practice.
- On risk mitigation, Ofcom said: "We note that some respondents*** would like to see our Codes recommend providers to mitigate all risks from a service provider's risk assessment. As explained in 'Our approach to developing Codes measures' (1.39), we

cannot do this. The safety duties in the Act only require providers to take proportionate steps and we can only make recommendations we are satisfied are proportionate, having impact assessed them. We cannot assess the impact of a proposal if we do not know what compliance with it would entail." (Vol 1 5.23)

- On core vs enhanced measures: "We have decided not to make a firm recommendation about how many of the enhanced inputs they should use and which ones they should use. We expect providers to exercise a degree of judgment about this and select whichever of the enhanced inputs are most relevant to their assessment." Elsewhere, some enhanced measures have been removed from small platforms.

[***Note: to understand what Ofcom means when it says "some respondents", we include here the full list of the 21 civil society responses referenced in the footnotes on page 64 of Volume 1. *"5Rights Foundation response to May 2024 Consultation on Protecting Children from Harms Online, p.1-2; 5Rights Foundation response to November 2023 Illegal Harms Consultation, pp.2, 19-20; Barnardo's response to May 2024 Consultation on Protecting Children from Harms Online, p.2; Barnardo's response to November 2023 Illegal Harms Consultation, p.10; Center for Countering Digital Hate (CCDH) response to May 2024 Consultation on Protecting Children from Harms Online, pp.2, 8, 9; CCDH response to November 2023 Illegal Harms Consultation, p.7; Children's Coalition for Online Safety response to May 2024 Consultation on Protecting Children from Harms Online, p.2; Children's Commissioner for England response to May 2024 Consultation on Protecting Children from Harms Online, p.29; Global Action Plan response to May 2024 Consultation on Protecting Children from Harms Online, p.1; Internet Matters response to May 2024 Consultation on Protecting Children from Harms Online, p.2; Internet Matters response to November 2023 Illegal Harms Consultation, p.2; Internet Watch Foundation (IWF) response to November 2023 Illegal Harms Consultation, pp.10-11; IWF response to May 2024 Consultation on Protecting Children from Harms Online, p.4; Marie Collins Foundation response May 2024 Consultation on Protecting Children from Harms Online, p.2; Molly Rose Foundation response to May 2024 Consultation on Protecting Children from Harms Online, p.41; NSPCC response to May 2024 Consultation, pp.23-24; OSA Network response to May 2024 Consultation on Protecting Children from Harms Online, pp.43-51; OSA Network response to November 2023 Consultation, pp.61-62; UK Safer Internet Centre (UKSIC) response to November 2023 Illegal Harms Consultation, p.33; UKSIC response to May 2024 Consultation on Protecting Children from Harms Online, p.22; Violence Against Women and Girls (VAWG) Sector Experts response to May 2024 Consultation on Protecting Children from Harms Online*]

Changes? Two small changes have been made to the two of the code's governance requirements to "ensure there are formalised accountability, reporting and audit processes in place for activities related to managing risks (including risks remaining after implementing Codes of Practice), as identified in a service's risk assessment". No other changes are made to the Codes except to weaken the extent of the application of the "enhanced" measures.

Small vs large companies

What we said: "there is a significant differentiation in Ofcom's approach to the risk assessment duties and the codes between large companies (7m+ monthly users) and small companies (everything else)"

What Ofcom says:
"Some stakeholders did not agree with applying measures to 'large' services or with our definition of 'large services'. Some stakeholders also disagreed with our position that some measures should not apply to smaller services. We have not changed our position on these points.(p539)

"We have decided to retain our definition of a 'large' service as one with more than seven million monthly UK users. This is roughly 10% of the UK population, and broadly equivalent to 'services with a large user base' in the Register. This approach of taking user base as a proxy for the size of service is similar to that adopted by the EU in the DSA.132 We consider it beneficial to broadly align our approach to determining larger services with other international regimes where possible as this will reduce the potential burden of regulatory compliance for service providers.(p35)

Changes? No. But industry evidence has led to a decision **to remove** "some measures from smaller low risk services, where the evidence we received suggested they were not proportionate."

Prioritisation of freedom of speech

What we said: The prioritisation of users' freedom of expression above adverse impacts on fundamental rights of others has significant implications for protection of women and those from minoritised groups, for whom targeted online abuse is a means of silencing them.

What Ofcom says: "Victims' and survivors' human rights may also be engaged in relation to measures we do not recommend, if the harms to which they are exposed both engage their human rights and are sufficiently serious. However, the Act does not permit us to make recommendations we have not impact assessed. As set out in paragraphs 1.51 to 1.56, we have adopted an iterative approach to our Codes. Delaying the Codes until we have a fuller set of recommendations would deprive users of such protections as we can put in place now. … Accordingly, although we acknowledge some benefits to human rights of our measures in our thinking, the main focus of our analysis for each measure is on whether their benefits overall justify any possible interferences with human rights" (Approach to the codes 1.102)

Changes? No.

Weak measures re vulnerable groups, including women and girls

What we said: there will be limited improvement in the online safety of children, women, Black women especially and other minoritised groups. "Overall, the impact of all the decisions taken by Ofcom above will do little to shift the dial in terms of improving safety for children, women, especially Black women and other minoritised groups"

What Ofcom says: "Women and girls are disproportionately affected by online harms. Our measures mean users will be able to block and mute others who are harassing or stalking them. Our Codes will also require providers to take down intimate image abuse (or "revenge porn") material when they become aware of it. Following stakeholder feedback, we have also provided guidance on how providers can identify and remove content posted by organised criminals who are coercing women into prostitution against their will."

Changes? Two changes in relation to the illegal content judgement guidance, relating to tackling non-consensual intimate image abuse and cyberflashing (see above), are notable and welcome. No other changes. Our central concern remains: that the VAWG guidance, due next month, will have limited effect when the codes underpinning it are so weak.